

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

15-CR-637 (KAM)

4 Plaintiff,

United States Courthouse  
Brooklyn, New York

5 -against-

May 12, 2017  
10:00 a.m.

6 MARTIN SHKRELI,

7 Defendant.

8 -----x  
9 TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING  
10 BEFORE THE HONORABLE KIYO A. MATSUMOTO  
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES

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25 produced by computer-aided transcription.

## Motion Hearing

1 (In open court.)

2 COURTROOM DEPUTY: All Rise. This is oral argument  
3 on Mr. Shkreli's motion to compel documents, 15-CR-637, United  
4 States Versus Martin Shkreli.

5 Will counsel on behalf of the Government state your  
6 appearance.

7 MS. SMITH: Good morning, your Honor, Alixandra  
8 Smith on behalf of the United States.

9 THE COURT: On behalf of non-party Retrophin.

10 MR. SCHWARTZ: William Schwartz, Nicholas Flath and  
11 Ian Shapiro, Cooley LLP for Retrophin.

12 THE COURT: On behalf of defendant.

13 MR. AGNIFILO: Mark Agnifilo. I'm here with  
14 Mr. Shkreli and Andrea Zellan and Teny Geregos.

15 THE COURT: Good morning. This is the defense  
16 motion, so if you would like to be heard first, Mr. Agnifilo.

17 MR. AGNIFILO: So we're making a motion at this  
18 point because we've essentially had a break down in our  
19 ability to agree. I think we agreed on a great deal. And I  
20 know that this issue was teed up for motions in maybe back in  
21 November and December. And to Retrophin's credit and to  
22 Cooley's client, we had productive dialogue. The dialogue  
23 broke down a couple of months ago; it's prompted us to today.

24 Ultimately I'm trying to be reasonable. I think I,  
25 probably in good faith, have given some of the case law and

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1 there is nothing terribly binding. We have some District  
2 Court decisions that I've cited to your Honor. There is a  
3 contrary decision from the Southern District, which we've  
4 distinguished in our papers. But I, in good faith, I could  
5 argue for a wholesale waiver of everything. And obviously I  
6 lead with that, but saying I'm not going to do that.

7 THE COURT: I thought you had done that. So you're  
8 not going to do that?

9 MR. AGNIFILO: I'm trying to be more surgical. I  
10 think that I can argue for that. And the tricky thing for  
11 someone in my position and this is one of the things I want to  
12 throw out to your Honor, because I could see this coming down  
13 the pike, we're trying to isolate the things that are most  
14 relevant. And Ms. Zellan put together a colored chart in one  
15 of our briefs, that was our way of prioritizing.

16 One of the concerns I have, I'll put it out there  
17 now because your Honor might have thoughts about it, is this  
18 is how we see the case today based on e-mails that we have and  
19 discovery that we have. We're going to get 3500 material in  
20 about a month. We're going to be getting other information  
21 from the Government in about a month. Maybe nothing will  
22 change; maybe we're predicting right, maybe the way we see the  
23 case now will be the way we continue to see the case. But  
24 things could change. And so why I bring up the wholesale  
25 waiver, is because that may be easier later. What I mean by

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1 that is, we've prioritized now and we're in disagreement about  
2 900 or so e-mails.

3 My concern, and I put it on your Honor's radar  
4 screen is, I could see a situation where because of the way  
5 something develops at the trial that there are e-mails that we  
6 haven't been given that maybe with another e-mail puts it into  
7 context. That is really part of what we're trying to do. And  
8 that is part of what our prioritizations have been focused on,  
9 things that are going to be important.

10 The capitalization table is important. It's alleged  
11 in the indictment. A lot of our highest priority requests  
12 relate to the capitalization table. There are e-mails that we  
13 think Retrophin gave to the Government that might relate only  
14 to one e-mail in that day, when in fact there is a whole  
15 string of e-mails leading up to that e-mail; that happens a  
16 few times.

17 And so what we're trying to do now, essentially, is  
18 look to the future, not so far in the future because the trial  
19 is almost upon us. What is going to come up at the trial and  
20 how do we make sure now that we have the e-mails that we think  
21 we need to give the Government's evidence context, and to have  
22 our own evidence either on cross-examination or on our direct  
23 case.

24 So my concern, the reason I led with yes, I do  
25 believe that Retrophin -- for the reasons that I put in my

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1 brief and I don't need to go through them again -- has  
2 essentially waived, as to the whole, anything that is a  
3 communication involving Martin Shkreli or communications that  
4 have to do with legal advice that would be going to Martin  
5 Shkreli.

6 THE COURT: But you know you still have a hurdle  
7 under Nixon and Rule 17 to show that it's relevant. Simply  
8 because there is a communication on some other subject it  
9 doesn't mean it's relevant to any of the charges or your  
10 defenses.

11 MR. AGNIFILO: That is true. So and that's why --  
12 there is two separate issues, your Honor. I agree with your  
13 Honor, we don't -- just because there is a privilege waiver  
14 doesn't mean it's relevant for purposes of Nixon. I think  
15 that's right. What we tried to do through our prioritizations  
16 is address essentially both issues at the same time. Because  
17 the things that we believe are priorities are e-mails that  
18 seem to directly relate to issues that are going to be part of  
19 Government's case, the capitalization table for one; other  
20 e-mails that I think that the Government is going to seek to  
21 elicit, for another. It's hard to speak in the abstract.

22 THE COURT: You're not speaking in the abstract  
23 because you've had the opportunity to review all of these  
24 documents. And what I would have hoped to have had from you  
25 is a more specific indication as to why these documents are

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1 documents that you need. It seems to me that you painted with  
2 a very broad brush saying anything relating to Mr. Shkreli's  
3 communications with a lawyer should be produced because it's  
4 waived. And that's where I'm having trouble.

5 I think you're making a little more specific and  
6 more articulate showing during the oral argument, but I would  
7 say for the most part when you provided color coding for  
8 priorities, I didn't get a sense that you had specifically  
9 said, this e-mail is important because it's likely to be  
10 exculpatory on the point of count whatever it is. Just trying  
11 to explain with more specificity why you need this document.

12 You could probably well imagine that as we have been  
13 going through these documents on the privilege log, it's a  
14 much harder task. Because we, unlike the parties, the Court  
15 is less familiar with all the players and the nitty gritty of  
16 the transactions and the nuances that you might want to tease  
17 out of these documents.

18 MR. AGNIFILO: Can I make a suggestion?

19 THE COURT: Yes. But I want to look back, as you  
20 know, last evening we did issue an order. The reason for that  
21 order was because our review, and we had gotten through a  
22 fairly substantial portion, indicated that there were some  
23 inconsistent redactions. There might have been some  
24 overbreadth in terms of wanting to withhold documents that in  
25 our view weren't apparently involved in an attorney-client

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1 communication. It might have involved an attorney, but it  
2 wasn't really for the purpose of seeking or giving legal  
3 advice. It just happened to be a discussion where one of the  
4 attorneys was present and speaking with Mr. Shkreli or  
5 exchanging e-mails with him. And I didn't think, at least on  
6 Retrophin's part, for some of these documents there had been  
7 an adequate showing of privilege in all instances.

8 And the other issue we had, was that we were looking  
9 at sometimes three or four versions of the same e-mail train.  
10 And in some of those trains a specific e-mail or statement was  
11 redacted; but in identical e-mail trains it wasn't redacted.  
12 We don't want to look at duplicates, triplicates or even  
13 quadruplicates of documents. It's very difficult and  
14 burdensome frankly. Fortunately my clerks have been involved  
15 in document productions, they are aware that there are  
16 programs to de-dupe.

17 The reason for the order last night was to say,  
18 let's make it easier for everybody by eliminating duplicates,  
19 by making sure that your redactions are consistent through  
20 your assertions. And that you identify with better  
21 specificity why you think it's privileged. Because it's not  
22 clear to us based on our read of the document that there is  
23 anything legal about the nature of the conversations.

24 But, you've seen these documents unlike many  
25 defendants in the cases, so you do have the ability to make a

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1 better showing as to why these documents are important and  
2 necessary or implicate Mr. Shkreli's constitutional rights.

3 MR. AGNIFILO: What I was going to suggest, your  
4 Honor, following on what your Honor wrote to us last night, we  
5 would be very happy to try to make the Court's job somewhat  
6 easier by being more specific document by document. What I'm  
7 wondering is, does it make the most sense to do what your  
8 Honor asked in your Honor's order last night? Meaning, let's  
9 de-dupe it and get the number down. And what I understood  
10 your Honor to be asking from Retrophin, as well as this  
11 morning, is to have clear showing of why certain things are  
12 privileged. What you're asking is essentially relevance.

13 And so maybe it makes sense to your Honor to set the  
14 date of May 17. If we could have the pare down list, I don't  
15 know if it goes from 900 documents to 500 documents.

16 THE COURT: We're guessing it's going to get that  
17 low, we think so when you say 400, 500.

18 Because even you didn't consistently color-code some  
19 of these documents. It might have been a yellow, then orange,  
20 then another place the same document was a red. Because there  
21 are duplicates, it's very hard to keep track. I know these  
22 programs could make it easier for everybody.

23 MR. AGNIFILO: Right. So what I was going to  
24 suggest is, if Retrophin thinks it can meet your Honor's  
25 deadline by the 17th, we could then maybe take, I don't know,

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1 five days or a week to go within that universe of 500 or so  
2 documents and say this is really what we need, this is really  
3 what we don't need, and try to give a reason to your Honor and  
4 to Retrophin.

5 THE COURT: It also has to, as you know, if we're  
6 going to look at Swidler and Judge Furman's discussion, you  
7 have to demonstrate what touches on a constitutional right.  
8 It has to rise to a need that would -- and I understand the  
9 general concept that Mr. Shkreli has a right to present a  
10 defense. But particularly, if you think a document is  
11 exculpatory or bears specifically on a defense that he wants  
12 to make, I understand that he's making the advice-of-counsel  
13 defense. But it doesn't mean that every single communication  
14 with a lawyer is going to be relevant to that defense.

15 MR. AGNIFILO: I understand. So what I think would  
16 make -- the Court has a lot on its plate with all this, I  
17 recognize.

18 THE COURT: This isn't my only case.

19 MR. AGNIFILO: I know. And what I'm hoping --  
20 because I think we're okay, I think we're okay with time. I'm  
21 glad we're doing this now rather than taking up a jury's time.

22 If Retrophin could do what it needs to do in a week.  
23 If we can take another week and do exactly what your Honor is  
24 asking, meaning this we think relates, this we think is  
25 relevant because it puts another likely admitted e-mail from

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1 the Government in context, which might be not as compelling a  
2 reason as -- I'll discuss Swidler in a second, I'm surprised  
3 quite frankly that that case is invoked. I'll come back to  
4 that in a minute.

5 THE COURT: They do say there is no reason to treat  
6 the attorney-client privilege differently in a civil or  
7 criminal case. But they also do say there may be instances  
8 where the need in a criminal case raises constitutional  
9 issues.

10 MR. AGNIFILO: But what is interesting about Swidler  
11 is there is a special prosecutor. The prosecution is saying  
12 criminal cases are, for lack of a better word, more important,  
13 more compelling, than civil cases. So then we, the  
14 prosecution, we should get access to Vince Foster's lawyer's  
15 notes. There is no tie in to a criminal defendant's Sixth  
16 Amendment right in Swidler. The prosecution wants it.

17 What happened is Judge Furman picked up on it. I  
18 think for the general proposition, that criminal and civil  
19 cases aren't on equal footing when it comes to the  
20 attorney-client privilege, which may or may not be true. But  
21 what Judge Garaufis and Judge Furman recognize is that in  
22 criminal cases the criminal defendant has a Sixth Amendment  
23 right, which changes things. What we'll try to do --

24 THE COURT: You need to tie in Mr. Shkreli's right,  
25 Sixth Amendment right, to present a defense to the specific

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1 documents that you seek.

2 MR. AGNIFILO: We'll do that. What makes the most  
3 sense, and hopefully makes everyone's life easier, we can pare  
4 things down to five or 600. I think that Retrophin was  
5 following our lead to a certain extent in de-duping or not  
6 de-duping, there is no blame here.

7 THE COURT: I'm not blaming anybody. It was a  
8 hellish process.

9 MR. AGNIFILO: Thank you, your Honor said it.

10 So we can pare this down. We'll do our part to  
11 comply with the Sixth Amendment. We'll give that list to your  
12 Honor.

13 THE COURT: I think you should work off the cleaned  
14 up list that Retrophin hopefully can provide. You shouldn't  
15 work on what is there, because again, your priorities were  
16 sometimes inconsistent. I don't blame you for that, you can't  
17 keep track mentally of what you've seen and what you want  
18 redacted.

19 Should we hear from Retrophin, Mr. Schwartz?

20 MR. SCHWARTZ: Good morning, your Honor. Speaking  
21 for my colleague Mr. Flath next to me, we agree this is a  
22 hellish process. I don't know from hell, but he does.

23 I have a few things I'd like to address, your Honor.  
24 The first is this notion of general waiver. While I know  
25 you're not getting to that yet, I think it bears some

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1 attention. The argument that's made in Mr. Shkreli's papers  
2 is essentially that we have waived, because we turned  
3 documents over to the Government, and then somehow fit them  
4 into subject matters post facto. That's absolutely not true.

5 Your Honor has seen all the papers. We turned  
6 documents over. We did not turn over privileged documents to  
7 the Government. We made a waiver. We informed the Government  
8 of the scope of the waiver and the specific subject matters  
9 that were waived. We were very careful to do it by subject  
10 matter.

11 We then waited for the Government to litigate  
12 Mr. Shkreli's claim of privilege before Judge Weinstein. And  
13 when Judge Weinstein ruled the first time -- so that's --

14 The notion of the general waiver because we somehow  
15 were willy-nilly giving documents to the Government is  
16 inaccurate.

17 The second argument that they make is this sword and  
18 shield argument. There was no sword and no shield. We looked  
19 at what the Government had asked us to look at, we waived.  
20 Then when Mr. Shkreli came to us with subject matters that he  
21 thought were relevant, we made exactly the same kind of  
22 assessment that we made with respect to the Government's  
23 request, and we waived with respect to ten separate subject  
24 matters. So we've treated both sides exactly the same here.

25 The issue now is, I think it's fair to say, that at

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1       least the way we look at the case, every privileged  
2       communication that is relevant to the charges in the case has  
3       been waived and turned over through these 14 different subject  
4       matters to the parties. We're now talking about documents  
5       that fall, at least in our view, well outside the scope of  
6       those subject matters and well outside the scope of what this  
7       case is about.

8               THE COURT: I would agree with you. With all do  
9       respect to Mr. Agnifilo, I don't believe that there is a  
10       general waiver. If you look at the Treacy case, Judge  
11       Rakoff's decision. First of all, there are no documents that  
12       have been provided by Retrophin only to one party; all  
13       documents have been provided to both parties. So it would be  
14       unfair to say that they had withheld certain documents from  
15       the defense, but only given them to the Government and they  
16       are using the documents as a sword and shield.

17               And if there are such documents, you have not  
18       identified them, the defense has not identified them. Nor has  
19       the defense identified documents in the privilege log that are  
20       of the same subject matter that would perhaps warrant  
21       consideration under Rule 502(a) as an intentional waiver. And  
22       are there still undisclosed documents that bear on the same  
23       subject matter that should also be provided.

24               We're now seeing a lot of documents in the  
25       privileged documents that could be said to bear on the

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1 previously disclosed subject matters. But if there are such  
2 documents, certainly you should identify them.

3 MR. SCHWARTZ: So your Honor, the second point I'd  
4 like to discuss, I understand from your order that your Honor  
5 may be undertaking some kind of balancing test about whether  
6 he should get the documents or not get the documents. We  
7 think that both the Supreme Court and the Second Circuit have  
8 been pretty clear that there shouldn't be a balancing test.

9 THE COURT: Actually they talk about performing a  
10 balancing test in weighing a Sixth Amendment right against any  
11 other privilege but for the attorney-client privilege, they  
12 discourage the balancing test. So what is a Court left with?  
13 I mean, I think that the rule itself says unless required by  
14 the Constitution, privileges have to be acknowledged by the  
15 Court, Rule 501 I think it is. So what can Courts do except  
16 balance? I'm not in a position to balance right now. I don't  
17 think either party has made sufficient showings to me.

18 MR. SCHWARTZ: I understand that, your Honor. But  
19 the argument that is being made here doesn't even go to  
20 constitutional rights, it goes to relevance. The one thing we  
21 all know about privilege in every case is that privileged  
22 documents -- in all criminal cases there are privileged  
23 documents floating around that may be relevant. Relevance is  
24 not the touchstone of anything in this case. It should not be  
25 the touchstone for waiver of attorney-client privilege, even

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1 if you follow the Weisberg case. The touchstone is that it's  
2 constitutionally compelling, that due process is at stake.  
3 Not that the document may bear in some way on the issues  
4 tried, but that the defendant is deprived of a fair trial if  
5 he does not have access to that document.

6 THE COURT: I think the defense knows that. I think  
7 he's committed to identifying those documents once you  
8 provide.

9 MR. SCHWARTZ: What I hear from Mr. Agnifilo, from  
10 what he's talking, is relevance, relevance, relevance. That's  
11 not the standard that ought to be applied. If any standard  
12 should be applied here it should not be relevance. The burden  
13 on him I think at this point, if we can show that the  
14 documents are privileged, is very high. It is to show that  
15 there is a constitutional and compelling reason that he will  
16 be deprived of due process if the document is not turned over.  
17 I think given knowing what I know about these documents, I  
18 think that's a standard that he can't meet. Obviously he's  
19 going to try again. But I would ask the Court when its  
20 reviewing that, to keep that constitutional standard in mind.

21 THE COURT: We certainly will.

22 Let me ask you, Counsel, is the May 17 date doable?

23 MR. SCHWARTZ: Let me confer with my colleagues.

24 THE COURT: My colleague clerks who have been in  
25 your colleagues' shoes advised me it should be doable.

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1                   MR. SHAPIRO: I think if we're de-duping and sort of  
2 reassembling the threads and e-mail chains that are subsets of  
3 each other and ensuring each review, we can do that by the  
4 17th.

5                   THE COURT: There is another piece, you have the  
6 burden to establish that the document is privileged  
7 attorney-client communication, and for some of the documents  
8 it's just not clear why they are in there.

9                   MR. SHAPIRO: We will go back through every document  
10 before the 17th, we can do that. I think in so far as the  
11 order encouraged us to provide more of a description, I think  
12 that part becomes hard to do by the 17th. Perhaps  
13 Mr. Agnifilo doesn't need that, at least in the case of all  
14 the documents where he already has the document. So  
15 everything else but that last part where we would be  
16 supplementing all of the descriptions, is doable by the 17th.

17                  I know that there are documents in here I think  
18 which Mr. Agnifilo doesn't have because Mr. Shkreli was not a  
19 party of the communication and didn't receive it under the  
20 Court's prior orders. We'll supplement those descriptions by  
21 the 17th.

22                  THE COURT: Let me confer with my clerk for one  
23 minute.

24                  I understand that an associate tasked with doing the  
25 doc review might have some difficulty, I'm not criticizing

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1       whoever did this. But my point is that there were some  
2       documents where I think some review should have been made  
3       about the designation about an attorney-client privilege  
4       document. The substance of the communications, at least as  
5       far as I could tell, was not even remotely in the context of  
6       giving or receiving legal advice.

7               I would give you a document number if I could, but  
8       we -- I can do that now, maybe you can see my problem. It's  
9       BA0008930, that one was kind of a mystery to us. Because  
10       although it may have involved an attorney and the Retrophin  
11       individual, it just wasn't on its face.

12               MR. SHAPIRO: We'll address all of that. I totally  
13       get what you're saying. One other point, because the way the  
14       documents were produced by Katten, it wasn't possible to avail  
15       ourselves of the electronic de-duping software. We didn't not  
16       avail ourselves of that. We'll now be doing it manually; it's  
17       not that big of a deal. That's why we didn't do it in an  
18       automated way, the way your clerks were describing to you.

19               THE COURT: All right. Well, maybe you can confer  
20       with Katten and ask them to give you some format that would  
21       allow it.

22               In any event, I think that if May 17th is a doable  
23       date then what would the defense need in terms of time after  
24       the 17th to revise its pitch for breach of the attorney-client  
25       privilege?

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1                   MR. AGNIFILO: I think the only wrinkle is, I guess  
2 there are certain documents that we don't see, we get  
3 descriptions of. And so I don't know how you guys would do  
4 it, it would be easier in time if you do those first, give  
5 those to us. I think we could turn it around in a week.

6                   THE COURT: All right. I guess at the same time you  
7 provide your revised description, you'll give me the documents  
8 or identify those by Bates numbers as well so we'll start  
9 looking at them. Because, it's not always clear to us what  
10 they have and what they haven't been able to review.

11                  MR. SCHWARTZ: Yes, your Honor.

12                  THE COURT: Okay.

13                  MS. SMITH: Your Honor, from the Government's  
14 perspective, obviously we're not involved in the motion, but  
15 we're in a very strange position for the Government. Because  
16 the documents went from Katten to Mr. Shkreli. Then  
17 Mr. Shkreli and Retrophin have been discussing what documents  
18 are kind of now outside of the privilege. We have received  
19 from defense counsel all of the MSMB documents from Katten  
20 where the privilege was waived. We have not received from  
21 defense counsel any Retrophin documents where the privilege  
22 was waived. We would request that when there is the universe  
23 of documents from this production related to Retrophin over  
24 which the privilege has been waived, that they be then  
25 provided to the Government. Because otherwise we're in a

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1 position where they have non-privileged documents that they  
2 are claiming are relevant to the case to use at trial that  
3 they have not produced.

4 THE COURT: So Retrophin did not give you those  
5 documents?

6 MS. SMITH: They haven't given us yet because we are  
7 discussing the final scope.

8 MR. SHAPIRO: The documents were provided from  
9 Katten to Mr. Shkreli. And then Mr. Shkreli asked us to waive  
10 on certain subjects of documents. But Mr. Shkreli already had  
11 all of those documents, so whether Mr. Agnifilo produces them  
12 to the Government or we do, we'll work that out.

13 MS. SMITH: I just wanted to put that on the record.

14 THE COURT: Thank you. It was a little strange to  
15 serve a subpoena not on Retrophin, but on its former counsel.  
16 I know that was done in the Treacy case, but it seems usually  
17 you serve the subpoena on the party whom you're seeking  
18 documents because they are at a disadvantage when you hit the  
19 attorney for the client's documents, just going forward.

20 All right. Are you going come back for oral  
21 argument or once we get squared away move forward on the  
22 submissions?

23 MR. SCHWARTZ: I think at this point, your Honor,  
24 why don't we wait and see what everybody submits, then we can  
25 let the court know.

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1                   THE COURT: All right.

2                   MR. AGNIFILO: We're going to try to agree. I'd  
3 rather -- we have bigger battles to fight -- we do, they  
4 don't -- in the future. I'd rather save my powder for those.  
5 We'll talk in good faith, as we have, with Retrophin.

6                   THE COURT: All right. I do appreciate Retrophin's  
7 counsel and Retrophin itself in trying to be reasonable and  
8 working despite a reasonable view that it could be all of  
9 this, but none the less.

10                  MR. AGNIFILO: We don't think so.

11                  THE COURT: I understand.

12                  MR. AGNIFILO: Before we break, at the last court  
13 date I requested -- and just in fairness, your Honor didn't  
14 rule one way or the other -- that the Government provide us  
15 with the subpoenas that are provided to Retrophin. What they  
16 did is they submitted a letter that had I guess the contents  
17 of the subpoenas but not the subpoenas. And the subpoenas  
18 themselves are relevant because I think it's relevant to see  
19 what they ask for at different times. What they got at  
20 different times. And so I would just renew that request.

21                  MS. SMITH: Your Honor, the Government doesn't  
22 publicly file subpoenas, Grand Jury subpoenas.

23                  THE COURT: They were all Grand Jury?

24                  MS. SMITH: They were all Grand Jury subpoenas.

25                  That's why we provided the request and the attachments rather

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1 than the physical subpoenas. We're happy to advise defense  
2 counsels which dates the various requests were on.

3 MR. AGNIFILO: I guess what confuses me, there is a  
4 subpoena issued four months ago. There is no Grand Jury  
5 sitting four months ago. I don't understand that part of it.

6 MS. SMITH: The investigation is ongoing. And there  
7 are other individuals and other issues related to this, even  
8 though this particular case with this particular piece of it,  
9 this is not the only individual that's connected to this that  
10 the Government is still looking at for related issues.

11 MR. AGNIFILO: One of the concerns I have there,  
12 Judge is, as is black letter law, you can't use Grand Jury  
13 subpoenas to prepare for trial. And I'm not besmirching the  
14 good faith of the Government, but if the Grand Jury subpoena  
15 is issued in January I think it raises the issue of what are  
16 they asking for? What are they investigating? Is that a good  
17 faith use of a Grand Jury subpoena?

18 It's odd. At this point the superseding indictment  
19 had been returned. A trial was five months away, and there is  
20 a Grand Jury subpoena. It raises a lot of questions.

21 THE COURT: Well, I trust the Government understands  
22 what is proper and what is not. And they will not be using  
23 any documents yielded from the January Grand Jury subpoena in  
24 this case.

25 MS. SMITH: Your Honor, we provided all of those

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1 documents to the defense. Most recent subpoenas were actually  
2 related to arbitration documents. I think those are the last  
3 few requests that came out, some of which defense counsel  
4 already has.

5 Like I said, Mr. Shkreli is not the only person that  
6 was looked at in connection with this investigation. There  
7 are ancillary issues. Certainly to the extent that the  
8 documents are relevant for this case, we would be using them.  
9 But I think most of the documents are actually just kind of in  
10 connection with this particular case, as opposed to the other  
11 investigation that might be ongoing or filling in gaps.  
12 Frankly, defense itself has asked for documents related to,  
13 but that's where we are.

14 MR. AGNIFILO: I think it's all more important to  
15 try to get the subpoenas. We don't know, there may be a basis  
16 legally to challenge the admissibility of any evidence that  
17 was gained as a result of the January Grand Jury subpoena. We  
18 don't know what that is. So I think it's relevant. And I  
19 think it's more relevant than even before we knew this was a  
20 Grand Jury subpoena that we get the subpoenas. We can do it  
21 on a protected order, give them to us and not file them  
22 publicly. We'll be happy to agree to such an order to  
23 safeguard whatever. It's a subpoena, so it's not a private  
24 document. It was given to Retrophin. I don't know what they  
25 are trying to protect. I'm willing to sign a confidentiality

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1 order.

2 I think it's important that we understand what  
3 documents were gathered by what subpoena, especially if a  
4 Grand Jury subpoena is being used four months ago.

5 THE COURT: Well, what is your response, Ms. Smith?

6 MS. SMITH: We're happy to provide them. We're not  
7 going to file them publicly, which is why we put the request  
8 on because obviously those, the face of the subpoena should  
9 not be filed publicly. The most recent one involved the  
10 Rosenfeld arbitration, which Mr. Agnifilo has asked for  
11 documents on. I'm not sure what he's talking about in terms  
12 of sub-protection. We can reissue the trial subpoena for the  
13 same documents if Mr. Agnifilo would like us to do that. We  
14 will provide the dates and kind of give them that information.

15 MR. AGNIFILO: I appreciate that.

16 THE COURT: Is there in anything else?

17 MR. AGNIFILO: No. I guess, I'm not sure if we left  
18 it what makes the most sense. We'll get a week, then we'll  
19 let your Honor know if we need oral argument?

20 THE COURT: Seven days after the 17th which brings  
21 us to the 24th.

22 MS. ZELLAN: Your Honor, on a separate issue we've  
23 been in discussion with the Government with respect to voir  
24 dire. I think that we have a proposal for the Court to  
25 consider with respect to a jury questionnaire. We can submit

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1 that either today after court or later, or we could describe  
2 it in more detail now, if your Honor would like.

3 THE COURT: Well, I think I'd like to see it in  
4 writing first. We've asked for 120 jurors, is that enough?  
5 Look, we have to pay these people and we have to make sure we  
6 use them adequately. I know in the process of questionnaires  
7 we knock out people automatically for whatever reason they  
8 cannot sit for the trial. What I've done in the past is when  
9 there are questionnaires we set a date in advance for the  
10 jurors to fill them out, then set a short time frame for the  
11 parties to confer which of those jurors they agree should be  
12 excused for cause or hardship or whatever reason. And then  
13 hopefully we have enough left to do a jury selection. I'm  
14 contemplating four alternates, is that enough?

15 MR. AGNIFILO: Here's is my question, if we run out  
16 what do we do then? We have to wait two weeks?

17 THE COURT: No, we borrow from another jury pool.  
18 There will be jurors from other trials called in. Jurors will  
19 be randomly selected as to the which will be the 120 to fill  
20 out the questionnaires. If we need more people, we'll pull  
21 those who have been excused.

22 MR. AGNIFILO: I think that's fine. I think with  
23 the summer we're going to hit vacation plans and whatnot.  
24 People don't expect four-week trials. I think that's fine.

25 THE COURT: Yes. We found jurors for six-week

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1 trials in the summer in the past. I think we can do it again.

2 All right. Thank you. I'll get your agreed-upon  
3 voir dire for the questionnaire only.

4 MS. ZELLAN: Yes, the questionnaire only. We agreed  
5 on certain other questions that we asked your Honor to include  
6 in your questioning of the perspective jurors. We'll submit  
7 those as well.

8 THE COURT: All right. Thank you. Have a nice day.

9 (Whereupon, the matter was adjourned.)

10  
11 \* \* \* \* \*

12  
13  
14 I certify that the foregoing is a correct transcript from the  
15 record of proceedings in the above-entitled matter.

16 Rivka Teich, CSR RPR RMR  
17 Official Court Reporter